No. 91-256

In the Supreme Court of the United States

OCTOBER TERM, 1991

GENE GOTTI AND JOHN CARNEGLIA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

J. DOUGLAS WILSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court erred by dismissing a juror who had been threatened and by questioning the remaining jurors about the matter only after the jury returned its verdict.

2. Whether the district court properly admitted expert testimony to interpret conversations recorded during the investigation of petitioners.

3. Whether petitioners had standing to contest the alleged failure of federal agents conducting electronic surveillance to minimize the interception of conversations not subject to interception.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and rules:

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-256

GENE GOTTI AND JOHN CARNEGLIA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-48a, is reported at 928 F.2d 1289. The district court's findings of fact regarding the dismissal of a juror, Pet. App. 51a-68a, are unreported. A prior opinion of the court of appeals rejecting petitioners' claim that double jeopardy barred their retrial is reported at 846 F.2d 117. The opinion of the district court rejecting petitioners' double jeopardy claim is reported at 678 F. Supp. 46.

JURISDICTION

The judgment of the court of appeals was filed on March 22, 1991. A petition for rehearing was denied on May 14, 1991. Pet. App. 49a-50a. The petition for a writ of certiorari was filed on August 12, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of conspiracy to conduct the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d); conspiracy to distribute heroin and to possess heroin with the intent to distribute it, in violation of 21 U.S.C. 846; and possession of heroin with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Petitioner Carneglia was also convicted of traveling in interstate commerce to promote a narcotics business enterprise, in violation of 18 U.S.C. 1952. The district court sentenced each petitioner to 50 years' imprisonment, to be followed by a three-year special parole term, and it ordered each to pay a fine of $75,000. The court of appeals affirmed. Pet. App. 1a-48a.

1. The evidence at petitioners' trial showed that during a six-month period in 1982, petitioners and Angelo Ruggiero managed an extensive narcotics enterprise that distributed large quantities of heroin, cocaine, and methaqualone. Gov't C.A. Br. 6. During that period, petitioners and Ruggiero discussed narcotics transactions on numerous occasions. *Id.* at 8-11. On June 23, 1982, petitioners and Ruggiero arranged the delivery of two kilograms of heroin to a customer, William Cestaro. *Id.* at 12-13.

During the course of the government's investigation of petitioners, FBI agents applied for and received judicial authorization to engage in electronic surveillance of Ruggiero's telephone and house. In November 1981, the FBI obtained authorization to intercept conversations on the telephone at Ruggiero's house in Howard Beach, New York. In December 1981, FBI agents obtained authorization to place wiretaps on the telephones at Ruggiero's new house in Cedarhurst, New York. Later, FBI agents obtained authorization to place listening devices in several rooms of that house. Pet. App. 7a-8a.

2. At trial, the government introduced tape recordings of 52 telephone conversations and 39 other conversations in Ruggiero's residence. Gov't C.A. Br. 7. DEA Agent Gerald Franciosa, a 16-year veteran of narcotics investigations, testified as an expert witness on the meaning of petitioners' recorded conversations and the meaning of records seized from the person who delivered two kilograms of heroin at petitioners' behest on June 23, 1991. The district court instructed the jury that it should not accept Franciosa's testimony "merely because he is an expert. * * * The determination of the facts in this case rest [sic] solely with you. And it's up to you to determine to what extent you want to give such weight as you desire to the testimony of an expert witness." Pet. App. 46a.

3. After two mistrials, petitioners were convicted at a third trial. During their first trial in 1987, the government received information from confidential sources that efforts were being made to compromise the anonymous jury. After the government began an investigation of the alleged jury tampering, the district court found "that there is a very high degree of likelihood that the panel sitting on this case has to

some extent been compromised as a result of unlawful conduct circumstantially attributable to the defendants." On that finding, the district court granted the government's motion for a mistrial. Pet. App 4a-5a.

Petitioners moved to bar a retrial on double jeopardy grounds. The district court denied the motion, and petitioners took an interlocutory appeal. The court of appeals affirmed, finding that the "testimony presented at the [district court] hearing and the information the FBI received from confidential sources" supported the district court's finding "that there was a 'distinct possibility' of jury tampering." Pet. App. 5a-6a; *United States* v. *Ruggiero*, 846 F.2d 117, 123-124 (2d Cir.), cert. denied, 488 U.S. 966 (1988). Petitioners' second trial ended in another mistrial when the jury was unable to reach a unanimous verdict. Pet. App. 6a.

Petitioners' third trial also was conducted before an anonymous jury. On the day that counsel gave closing arguments to the jury, the United States Attorney's office received a letter from an attorney representing a man named Walter Arnold. The attorney reported that Arnold had received an anonymous note stating that the writer knew Arnold was a juror at petitioners' trial and that Arnold lived in the same block in Kings Park, New York, as the FBI agent in charge of the investigation of petitioners. The note stated that "[i]t seems improper for you to be on the same jury where the head FBI agent in charge is your neighbor" and urged Arnold to "bring this matter to the attention of the judge, goverment [sic] and the court." Pet. App. 9a-10a.

In fact, Arnold was not on the jury. The attorney who sent the letter, however, reported that Arnold's neighbor, whose name was not mentioned in the let-

ter, was a juror. Based on this information, the district court dismissed that juror, anonymous Juror No. 9, from the jury and replaced him with alternate Juror No. 1. Pet. App. 10a.

On the sixth day of deliberations, the jury sent out a note stating, "One juror refuses to vote, are there any guidelines to help us." In response, the district court gave the jury a modified *Allen* charge (see *Allen* v. *United States*, 164 U.S. 492 (1896)) that reminded the jurors that "every juror swore to render a verdict" and that "each juror must vote." Pet. App. 11a-12a. Later that day, the jury sent out another note, which stated that "a juror refuses to discuss the case at all." *Id.* at 12a. Over the objection of defense counsel, the district court conducted a voir dire of the juror referred to in the notes, who turned out to be alternate Juror No. 1, now Juror No. 9. During that interview, which was conducted in the presence of all counsel, Juror No. 9 denied that he was refusing to discuss the case or to vote. *Id.* at 12a-13a. The court sent the juror back to the jury room and delivered another modified *Allen* charge asking the jury to continue its efforts to reach a verdict. *Id.* at 13a-15a.

After the second charge, Juror No. 9 sent the court a note stating that "there were [sic] talk in the juror room concerning the fact that I could (go) to jail." The note also stated that Juror No. 9 believed that his "residence is known" and expressed concern for his family. The district court called the juror into chambers, reassured him that there was no possibility of his going to jail and that his residence was not known, and then sent him back to deliberate. Pet. App. 16a-17a. The court denied a defense motion for a mistrial. *Id.* at 17a.

The next day, the jury sent the district court a note stating that "the jury has reached an informal, unan-

imous agreement as to the guilt of the defendants," but that "due to the fears of one juror relating to alleged threats he received prior to deliberations, the jury is unable to reach a formal unanimous verdict on any of the 4 counts." Pet. App. 17a. The court ascertained that the juror to whom the note referred was Juror No. 9 and then called the juror into chambers with only law clerks and a court reporter present. At that meeting, the juror told the court that on the evening before he was substituted for the original Juror No. 9, he had encountered two men in his driveway as he returned to his home at about 11:00 p.m. According to the juror, the men addressed him by name and then stated, "you are on the Gene Gotti jury trial" or something similar. Juror No. 9 explained that, without waiting for him to answer, the two men turned and left. *Id.* at 18a. The juror stated that after the visit, he became increasingly concerned about the incident and that he had become afraid for his family. He also told the court that his fear motivated "some aspects" of his assessment of the evidence and his vote in the jury room. *Id.* at 20a-21a.

The court had the voir dire proceeding transcribed and made available to counsel. The government then moved for dismissal of the juror pursuant to Federal Rule of Criminal Procedure 23(b); petitioners moved for a mistrial. At that point, the court called Juror No. 9 back into chambers for further voir dire, during which the juror told the court that when he had sent his note to the court, he felt that he was being "coerced, persuaded by my fellow jurors" and that the other jurors had told him that he could go to jail if he did not participate in the deliberations. Pet. App. 21a-22a. The juror also stated that his vote in the jury room on petitioners' guilt had been swayed by the fear caused by the visit of the two men to his

house. Following those statements by Juror No. 9, the government again moved that the juror be excused for "good cause" under Rule 23(b), and petitioners renewed their motion for a mistrial. Pet. App. 24a-25a. The district court granted the government's motion. *Id.* at 24a.[1]

After the dismissal of Juror No. 9, the district court stated to counsel that it believed it ought to conduct an inquiry of the remaining jurors to determine whether they believed that they could render a fair and impartial verdict after being exposed to the events surrounding the dismissal of Juror No. 9. Counsel for petitioner Gotti twice stated for himself and counsel for petitioner Carneglia that "there is no need at this point to conduct an inquiry of the jury before or after the verdict." (Emphasis omitted). After the district court stated that it did not intend to voir dire the jury, petitioner Gotti's counsel moved to have the court instruct the jury to begin its deliberations anew. Pet. App. 35a-36a.

The district court then instructed the remaining jurors to "reexamine all the evidence from the beginning and any conclusion[s] that have been reached" in order to "reach a true and impartial and fair verdict, one way or the other, without bias or sympathy and without considering the dismissal of [juror] number nine." Pet. App. 25a. After that instruction had been given, defense counsel sought for the first time to have the court individually voir dire

---

[1] In a statement of findings of fact regarding the dismissal of Juror No. 9, the court stated that after the last interview with Juror No. 9, "[i]t * * * became apparent to the Court that the fear motivating Juror No. 9's vote was the fear generated by meeting the two men, and that, since his vote was being motivated by fear, there was 'just cause' for his dismissal." Pet. App. 66a.

each of the jurors. *Id.* at 37a-38a. Approximately ten minutes after returning to the jury room, the jury reported that it had reached a verdict. *Id.* at 26a. The court brought the jury back into court and told the jurors that it did not believe that they had taken enough time to deliberate on their own independently of Juror No. 9. The court then sent the jury back for further deliberations. *Ibid.* Three hours later, the jury sent out a note saying, "We have thoroughly considered all of the evidence in this case and have reached a unanimous decision." The jury then returned a verdict of guilty on all counts. *Ibid.*

At the government's request, the court polled the jurors to determine if their "verdict [was] based upon the evidence and no other reason"; if Juror No. 9's statements during deliberations affected their verdict; and if Juror No. 9's dismissal affected their verdict in any way. Each juror responded affirmatively to the first question and negatively to the second and third questions. Pet. App. 27a.

4. a. The court of appeals affirmed. Pet. App. 1a-48a. It first rejected petitioners' claim that the district court acted improperly in resolving the problems that arose during jury deliberations. In particular, the court held that the district court had not erred by giving the jury two modified *Allen* charges. *Id.* at 29a-31a. The court noted that the first charge was given in response to a specific inquiry from the jury and that both charges had cautioned the jury not to surrender any conscientiously held views. Moreover, the court found that "it is clear at least with the aid of hindsight that the single juror who was holding out against a guilty verdict was Juror No. 9," and thus that "any coercive impact of the *Allen* charges upon that juror was indisputably rendered irrelevant, and

accordingly unprejudicial, by his dismissal from the jury panel." *Id.* at 31a.

The court also held that the district court did not err in dismissing Juror No. 9. Pet. App. 31a-33a. In light of the fact that the "juror expressed a continuing state of fearfulness, told the judge that he had broken down in the course of apprising his fellow jurors of his situation, and had at one juncture refused to render any vote at all on the counts of the indictment," the court stated that it "would be rash indeed to second guess the conclusion of the experienced trial judge, based in large measure upon personal observations that cannot be captured on a paper record, that Juror No. 9 was disabled by fear from continuing to participate in the jury's deliberations." *Id.* at 33a. For these reasons, the court of appeals held that the district court had not abused its discretion in dismissing the juror under Rule 23(b). Pet. App. 31a-33a.

Next, the court of appeals held that the district court had not erred in its handling of jury deliberations that occurred after Juror No. 9 was dismissed. Pet. App. 33a-39a. It rejected petitioners' claim that the district court committed reversible error by failing to conduct an inquiry of the remaining jurors immediately following the dismissal of Juror No. 9 as to any impact the dismissal might have had on the jury's deliberations. The court noted that petitioners did not request such a voir dire until after the jurors had returned to the jury room to resume their deliberations in the absence of Juror No. 9. The court added that "decisions as to when to question jurors and the manner of that inquiry are generally left to the trial judge's broad discretion." *Id.* at 34a.

b. The court of appeals rejected petitioners' contention that the listening devices in Ruggiero's house were operated in a manner that failed "to

minimize the interception of communications not otherwise subject to interception," as required by 18 U.S.C. 2518(5). Pet. App. 39a-40a. The court found "no basis" to overturn the decisions of two district court judges rejecting that claim. *Id.* at 39a. In the alternative, the court found that petitioners lacked an expectation of privacy in Ruggiero's house or telephone and therefore did not have standing to object to the asserted failure to minimize the conversations intercepted on the eavesdropping devices placed in those locations.

c. The court of appeals held that the district court did not abuse its discretion by allowing DEA agent Franciosa to testify as an expert regarding the conversations recorded in Ruggiero's house and on his telephone. Pet. App. 42a-46a. Although the court noted that Franciosa's testimony included "conclusions and interpretations," the court found that the testimony did not include any conclusion or opinion on the ultimate question of guilt or innocence. *Id.* at 45a.

ARGUMENT

1. Petitioners contend (Pet. 13-23) that the district court erred in dismissing Juror No. 9 when that juror admitted that his vote was motivated by fear, and that the court also erred in failing to question the remaining jurors prior to the resumption of deliberations to determine whether their ability to return a fair and impartial verdict had been affected by the dismissal of Juror No. 9.

a. Federal Rule of Criminal Procedure 23(b) provides, in pertinent part:

> if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court, a valid verdict may be returned by the remaining 11 jurors.

As the Rule itself provides, the determination whether "just cause" exists is a matter within the discretion of the district court. See *United States* v. *Armijo*, 834 F.2d 132, 135 (8th Cir. 1987), cert. denied, 485 U.S. 990 (1988); *United States* v. *Stratton*, 779 F.2d 820, 832 (2d Cir. 1985), cert. denied, 476 U.S. 1162 (1986). The court's discretion extends to removing jurors who have had improper contacts with people or materials. See *United States* v. *Ramos*, 861 F.2d 461, 465-466 (6th Cir. 1988), cert. denied, 489 U.S. 1071 (1989); *United States* v. *Gambino*, 788 F.2d 938, 946-949 (3d Cir.), cert. denied, 479 U.S. 825 (1986).

In this case, the district court plainly had "just cause" for dismissing Juror No. 9. That juror had received a late-night visit at his home from two men who knew his name and that he was serving on the anonymous jury in petitioners' case.[2] During two interviews with the district court, the juror told the court that the fear created by that encounter had impaired his ability to deliberate. The notes the court received from the jury confirmed that Juror No. 9 refused to deliberate or to vote.

Contrary to petitioners' claim (Pet. 15-17), the district court dismissed Juror No. 9 only after making a careful inquiry into the situation and taking several steps to avoid dismissal of the juror. When the court first became aware that one of the jurors was refusing to participate, it gave the jury two *Allen* charges that reminded the jurors of their duty to deliberate and vote. The district court interviewed Juror No. 9 on several occasions to determine the reasons for and

[2] Petitioners suggest (Pet. 15) that Juror No. 9 invented or exaggerated the incident. The district court, which interviewed the juror, was in the best position to assess his credibility, however, and that court found as a fact that the incident occurred. Pet. App. 54a.

the extent of his fear. During those interviews, the court attempted to reassure Juror No. 9 and urged him to discharge his duty as a member of the jury. The district court dismissed Juror No. 9 only after it became clear that, as a result of fear, the juror had become incapable of participating in the jury's deliberations. As the court of appeals held, the district court was in the best position to make that difficult determination, and the court's handling of the situation did not constitute an abuse of its discretion.[3] See *United States* v. *Molinares Charris*, 822 F.2d 1213, 1223 (1st Cir. 1987) (court of appeals should not "second-guess" a trial judge's decision to remove a juror), cert. denied, 110 S. Ct. 233 (1989); *United States* v. *Shackleford*, 777 F.2d 1141, 1145 (6th Cir. 1985) ("the trial judge is in the best position to determine the nature and extent of alleged jury misconduct"), cert. denied, 476 U.S. 1119 (1986).

b. Petitioners complain (Pet. 17-22) that the district court failed to interview the remaining jurors to determine if their ability to deliberate had been impaired by the dismissal of Juror No. 9. District courts enjoy broad discretion in deciding whether to examine jurors regarding the effect of outside influences

---

[3] Petitioners repeatedly assert that notwithstanding the care with which the district court handled the situation and the obvious fear felt by Juror No. 9, the district court erred because Juror No. 9 was holding out for acquittal. Pet. 17, 22. The evidence shows, however, and the district court found, that Juror No. 9 was not holding out for acquittal; rather, he was refusing to cast a formal vote at all. Pet. App. 17a, 62a-63a, 66a. For that reason, the Second Circuit's decision in *United States* v. *Hernandez*, 862 F.2d 17 (1988), cert. denied, 489 U.S. 1032 (1989), is inapposite. In any event, the court of appeals, and not this Court, is responsible for resolving intracircuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

on their deliberations. See *United States* v. *Pallais*, 921 F.2d 684, 686 (7th Cir. 1990), cert. denied, No. 90-8293 (Oct. 7, 1991); *United States* v. *Chang An-Lo*, 851 F.2d 547, 558 (2d Cir.), cert. denied, 488 U.S. 966 (1988); *United States* v. *Phillips*, 664 F.2d 971, 998-1000 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982). Because petitioners did not ask the court to conduct such an interview until after the court had sent the jury back to resume its deliberations, the district court's omission warrants overturning petitioners' convictions only if it was plain error. Fed. R. Crim. P. 52(b).

In this case, the district court was entitled to conclude that any inquiry of the jurors regarding the Juror No. 9 incident should wait until after the verdict. Any such inquiry prior to the resumption of deliberations after Juror No. 9 was dismissed would have further delayed deliberations that had already been significantly disrupted. Moreover, as the court of appeals pointed out, inquiry at that time may well have emphasized the facts of the incident and suggested to the remaining jurors that they should have been influenced by the juror's dismissal. See *United States* v. *Moten*, 582 F.2d 654, 661 (2d Cir. 1978).[4]

Petitioners suffered no prejudice from the district court's decision to postpone any inquiry of the jurors until after the verdict. When the district court sent the jurors to deliberate after dismissing Juror No. 9, it

---

[4] Petitioners attempt to distinguish *Moten* on the ground that the dismissed juror in that case had not discussed the possible jury tampering with the other jurors. But the district court in *Moten* did not make that finding. Instead, the court proposed to interview the jurors to determine whether such discussions had taken place. 582 F.2d at 657. In any event, the concern that a judge's questions about possible jury tampering may give substance to the threat is valid whether the dismissed juror discussed the incident with his fellow jurors or not.

instructed them that the dismissal should not affect their verdict.

Moreover, the district court made the inquiry requested by petitioners after the jury returned its verdict. No juror responded that the dismissal of Juror No. 9 had affected the jury's deliberations. See *Smith* v. *Phillips*, 455 U.S. 209, 217 n.7 (1982) (jurors able to determine whether they have been biased by a certain matter). Finally, the sequence of events in this case strongly suggests that the jury had agreed on petitioners' guilt while Juror No. 9 was still on the jury. Accordingly, petitioners have not shown either that the district court abused its discretion or that the verdict was returned by a biased jury.[5]

2. Petitioners next contend (Pet. 24-28) that the district court erred in allowing DEA Agent Franciosa to testify about the meaning of petitioners' recorded conversations. They argue that the court improperly allowed the agent to relate his own interpretations and conclusions regarding the conversations.

Federal Rule of Evidence 702 permits the admission of expert testimony that is helpful to the trier of fact. Petitioners concede (Pet. 25 n.16) that, as the court of appeals held (Pet. App. 43a), "the operations of narcotics dealers are a proper subject for expert testimony under Fed. R. Evid. 702." In addition, Rule 704 provides that "[e]xcept when testifying about a

---

[5] Petitioners assert (Pet. 20-22) that the court of appeals' decision conflicts with *United States* v. *Ferguson*, 486 F.2d 968 (6th Cir. 1973). In that case, however, a juror was contacted by a friend of the defendant. The juror then set out affirmatively to influence some of his fellow jurors. The court of appeals reversed because it found that the defendants had been prejudiced by the improper contact with the juror. In this case, by contrast, Juror No. 9 did not seek to influence the votes of his fellow jurors.

contested mental state of the defendant], [t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." The decision whether to admit testimony under Rule 702 is committed to the sound discretion of the trial court. See *United States* v. *Dicker*, 853 F.2d 1103, 1108 n.3 (3d Cir. 1988); *United States* v. *Nersesian*, 824 F.2d 1294, 1308 (2d Cir.), cert. denied, 484 U.S. 958 (1987).

In this case, Agent Franciosa provided interpretations of the conversations recorded by federal agents during the investigation of petitioners. Those conversations frequently involved coded or slang allusions to drugs, which the agent interpreted. The agent also several times told the jurors that conversations that did not expressly mention narcotics actually involved narcotics dealing. He also linked various conversations together for the jury and explained otherwise cryptic references in the conversations. Thus, the agent's testimony relied on his specialized knowledge of narcotics trafficking and explained conversations to the jury that it may not otherwise have understood. In addition, Agent Franciosa frequently qualified his interpretations by stating that they were only his opinions. And, as the court of appeals found, Pet. App. 45a, the agent did not couch his testimony in terms of "the applicable legal criteria." Finally, the district court expressly instructed the jury that it did not have to accept Agent Franciosa's testimony simply because he was an expert.

Petitioners nevertheless contend (Pet. 24 n.15) that the court of appeals' decision conflicts with *United States* v. *Vastola*, 899 F.2d 211, 233 (3d Cir.), vacated, 110 S. Ct. 3233 (1990), *United States* v. *Doe*, 903 F.2d 16 (D.C. Cir. 1990), and *United States* v. *Dicker*, 853 F.2d

1103, 1109-1110 (3d Cir. 1988). In *Vastola*, the court of appeals upheld the admission of expert testimony to explain the same sort of guarded language that Franciosa interpreted here. As in this case, the expert in *Vastola* interpreted language that could be understood only against the background of the defendants' criminal activity. In *Dicker*, the court of appeals reversed a conviction because a government expert, who was also the government's investigating agent, related his impressions of several conversations in which the agent participated. The court held that the conversations were "clear" and that expert testimony was not necessary to help the jury understand them. In this case, however, petitioners' conversations were replete with guarded allusions to transactions that did not, on their face, refer to narcotics. Agent Franciosa could properly interpret those conversations for the jury. Finally, in *Doe*, the court of appeals found that an expert's testimony was inadmissible because it was irrelevant and because its probative value was outweighed by its tendency to prejudice the defendants, in violation of Federal Rules of Evidence 402 and 403. The expert testimony in this case, by contrast, was properly held to be both relevant and not unfairly prejudicial.

3. Petitioners' final contention (Pet. 28-30) is that the court of appeals erred in concluding that they did not have standing to challenge on minimization grounds the introduction of conversations obtained from the wiretaps on Ruggiero's telephone and from the listening devices in Ruggiero's house.

The court of appeals did not rest its decision admitting the tape recordings on petitioners' lack of standing. To the contrary, the court accepted the conclusions of two district court judges that the evidence was not obtained in violation of federal electronic

surveillance statutes or of the terms of the judicial authorizations that permitted the surveillance. Pet. App. 39a.[6] Petitioners speculate (Pet. 30) that if the court of appeals had recognized their standing it would have engaged in a more detailed review of the district court's conclusion. But there is no basis in the court of appeals' opinion for that speculation, and thus no reason to question the court's holding that it saw "no basis to overturn" (Pet. App. 39a) the district court's rulings that the electronic surveillance complied with the statutory and judicial minimization requirements. Because petitioners do not seek review of the conclusion of the courts below that no violation of the statute or the authorizing orders occurred, resolution of their standing claim cannot affect the validity of their convictions.

In any event, the court of appeals correctly held that petitioners do not have standing to raise a min-

---

[6] The independence of this rationale from petitioners' lack of standing is made clear by the court of appeals:

> These contentions [that the electronic interceptions violated the minimization requirements in 18 U.S.C. 2518 and the orders authorizing the interceptions] were exhaustively considered and rejected by Judge Costantino, prior to the first trial of this case, in an evidentiary hearing conducted over a total of nineteen days and in a seventy-page opinion. They were also the subject of an adverse ruling by Judge McLaughlin when [petitioners] renewed their suppression motion after the case was reassigned to him. We see no basis to overturn these carefully considered determinations.
>
> Even if we did, furthermore, [petitioners] had no expectation of privacy in Ruggiero's house and telephone that would provide a basis for them to seek suppression of this evidence.

Pet. App. 39a.

imization objection with respect to the electronic surveillance of Ruggiero's house. In the courts below, petitioners claimed that the FBI agents conducting the surveillance failed to obey the requirement of 18 U.S.C. 2518(5) and of the various orders authorizing the surveillance that the agents conduct the surveillance "in such a way as to minimize the interception of communications not otherwise subject to interception." Sections 2518(10)(a)(i) and (iii) provide that "[a]ny aggrieved person" may move to suppress electronic surveillance evidence when "the communication was unlawfully intercepted" or "the interception was not made in conformity with the order of authorization." Section 2510(11) defines "aggrieved person" as "a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed."

As the court of appeals held, simply because a defendant is an "aggrieved person" within the meaning of Section 2510 does not give him the right to enforce minimization requirements if he does not possess independent privacy rights in the telephone or house in which surveillance is conducted. See *United States* v. *Gallo*, 863 F.2d 185, 192 (2d Cir. 1988), cert. denied, 489 U.S. 1083 (1989); *United States* v. *Ramsey*, 503 F.2d 524, 532 (7th Cir. 1974) (Stevens, J.), cert. denied, 420 U.S. 932 (1975). The rationale for those decisions is that a failure to minimize the interception of conversations occurring on a telephone in a house or in the house itself is an invasion of the privacy of those residing in the house, and not of all third parties overheard during the surveillance. A failure to minimize does not affect the rights of a person whose only connection to the surveillance is that he was a party to a conversation that was lawfully intercepted; that party's rights are not affected simply because

other conversations from the same premises should have been minimized. Petitioners did not reside in Ruggiero's house and therefore lacked standing to challenge the minimization procedures. The court of appeals therefore correctly rejected their claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

J. DOUGLAS WILSON
Attorney

OCTOBER 1991

U.S. GOVERNMENT PRINTING OFFICE: 1991—312 324/45113